ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 02-1244

Consolidated with Case Nos.
02-1246, 02-1247, 02-1248 & 02-1249

BEETHOVEN.COM, *et al.*,
Petitioners,

v.

THE LIBRARIAN OF CONGRESS,
Respondent.

On Petition to Review an Order of the Librarian of Congress

JOINT REPLY BRIEF FOR PETITIONERS RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

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February 12, 2004

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*Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

AFM	American Federation of Musicians of the United States and Canada
AFTRA	American Federation of Television and Radio Artists
AFIM	Association for Independent Music
Benchmark Agreements	Voluntary agreements negotiated between RIAA and 26 separate webcasters.
Beethoven.com Brief	Opening Brief of Petitioners/Intervenors Beethoven.com LLC, Inetprogramming Incorporated, Internet Radio Hawaii, Wherever Radio, and Intervenor Educational Information Corporation in Case No. 02-1244, Beethoven.com LLC, et al v. Librarian of Congress, filed June 20, 2003.
Broadcasters	The FCC-licensed broadcasters that were parties to the CARP Proceeding: Susquehanna Radio Corp., Salem Communications Corp., Clear Channel Communications Inc., Entercom Communications Corp., Infinity Broadcasting Corp., and the stations of the National Religious Broadcasters Music License Committee.
Broadcasters' Brief	Brief for Consolidated Participant Licensee Petitioners Salem Communications Corp., the National Religious Broadcasters Music License Committee, and Live365, Inc. in Case No. 02-1244, Beethoven.com LLC, et al v. Librarian of Congress, filed June 20, 2003.
Broadcasters' PFOF	Broadcasters' Proposed Findings of Fact and Conclusions of Law
CARP	Copyright Arbitration Royalty Panel
CARP Report	In re: Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel, No. 2000-9 CARP DTRA 1 & 2 (Feb. 20, 2003) (unpublished).
CRT	Copyright Royalty Tribunal
Copyright Owners and Performers	RIAA, AFM and AFTRA
DiMA	The Digital Media Association
DMCA	Digital Millennium Copyright Act
DPRA	Digital Performance Right in Sound Recordings Act of 1995
FCC	Federal Communications Commission
Librarian	Librarian of Congress

Librarian's Brief	Brief for the Respondent, the Librarian of Congress in Case No. 02-1244, Beethoven.com LLC, et al v. Librarian of Congress, filed June 20, 2003.
Librarian's Decision	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule and Order, 67 Fed. Reg. 45239 (dated June 20, 2002, published July 8, 2002).
NAB	National Association of Broadcasters
NRBMLC	National Religious Broadcasters Music License Committee
Office	Copyright Office
Owners' Brief	Joint Amended Brief for Petitioners Recording Industry Association of America, Inc., American Federation of Musicians of the United States and Canada and American Federation of Television and Radio Artists in Case No. 02-1244, Beethoven.com LLC, et al v. Librarian of Congress, filed July 8, 2003.
Owners and Performers	RIAA, AFM and AFTRA
PES Decision	Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings; Final Rule, 63 Fed. Reg. 45239 (May 8, 1998).
Petition to Modify	Petition of the Copyright Owners and Performers to Modify the Report of the CARP, Docket No. 2000-9 CARP DTRA 1 & 2 (March 6, 2002).
Register	Register of Copyrights
RIAA	Recording Industry Association of America, Inc.
RIAA Negotiating Committee	Committee of record company executives that oversaw RIAA statutory license negotiations.
RIAA PFOF	RIAA Proposed Findings of Fact and Conclusions of Law
RIAA Reply PFOF	RIAA Reply Proposed Findings of Fact and Conclusions of Law
Services	Statutory licensees that participated in CARP proceeding.
SWSA	Small Webcaster Settlement Act of 2002
Webcasters	The Webcasters that were parties to the CARP proceeding: BET.com, Comedy Central, Echo Networks, Inc., Listen.com, Live365.com, MTVi Group, LLC, Myplay, Inc., NetRadio Corp., Radio Active Media Partners, Inc., RadioWave.com, Inc., Spinner Networks, Inc., and XACT Radio Network, LLC.
115 Label Agreements	115 record industry agreements for the digital performance and reproduction of sound recordings negotiated in the marketplace between willing buyers and willing sellers.

INTRODUCTION

This case turns upon whether the Librarian of Congress ("the Librarian") correctly selected and applied a marketplace benchmark to establish a zone of reasonableness for royalty rates for the use of copyrighted sound recordings. As the Librarian has stated, the "first step" in establishing rates for a statutory license is to consider as benchmarks "rates negotiated in comparable marketplace transactions." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 63 Fed. Reg. 25394, 25404 (May 8, 1998) ("PES Decision") (J.A.____). In the proceeding below, the Librarian correctly selected one comparable marketplace deal, the Yahoo! Agreement, as a starting point in his benchmark analysis. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45240, 45248-49 (July 8, 2002) ("Librarian's Decision") (J.A.____).[1]

However, the Librarian ignored important direct and corroborating evidence in establishing the zone of reasonableness. He arbitrarily failed to consider 25 of the 26 Benchmark Agreements in his benchmark analysis. These voluntary agreements, which were negotiated between the Recording Industry Association of America ("RIAA") Negotiating Committee and various webcasters, uniformly contained higher rates that would have yielded a higher zone of reasonableness for royalty rates. The Librarian erred further by ignoring 115 Label Agreements negotiated in the actual marketplace, without the effects of a statutory license. These agreements between individual record companies and licensees strongly corroborated the evidence from the

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[1] The Broadcasters criticize the use of the Yahoo! Agreement as a marketplace benchmark (although they failed to offer any marketplace benchmark), because it is not precisely analogous. Broadcasters' Brief at 25-29. However, benchmarks from "rates negotiated in comparable marketplace transactions" are "marketplace point[s] of reference, and as such need not be perfect in order to be considered in a rate setting proceeding." PES Decision at 25404 (J.A.____).

Benchmark Agreements, indicating that the zone of reasonableness, and thus the statutory license royalty rates, should have been set higher.

The Librarian also adopted the incorrect benchmark for the minimum royalty fee, by arbitrarily selecting the lowest outlier from the range of minimum fees in the Benchmark Agreements. In addition, he arbitrarily adopted a term delaying the effective date for payment of royalties in arrears.

The Librarian's flawed analysis of the 115 Label Agreements and the 25 non-Yahoo! Benchmark Agreements requires reversal and remand for determinations consistent with the record evidence. This Court should also enter its own order setting the minimum royalty fee at $5,000 or more, and should direct the Librarian of Congress not to set delayed effective dates in future proceedings.

ARGUMENT

I. THE LIBRARIAN'S BENCHMARK ANALYSIS PROPERLY INCLUDED THE YAHOO! AGREEMENT BUT ARBITRARILY FAILED TO INCORPORATE EVIDENCE OF OTHER COMPARABLE AGREEMENTS.

This Court should reject the Librarian's attempt to equate the petitions of the Owners and Performers and the Broadcasters as "mirror images" attacking the Librarian's discretionary determination from opposite sides. Librarian's Brief at 62. This is not a "he said/she said" disagreement; the Librarian's assertion that the Owners and Performers, like the Broadcasters, are simply attacking the Librarian's rulings on the weight of the evidence, Librarian's Brief at 62-63, reflects a fundamental misunderstanding of the Owners and Performers' petition.

That petition is based upon the complete failure of the Librarian to consider two categories of comparable voluntary agreements, the 115 Label Agreements and the 25 non-Yahoo! Benchmark Agreements, in his rate benchmark analysis. The 115 agreements for the

digital performance and reproduction of sound recordings were negotiated in the marketplace between willing buyers and willing sellers, outside of the statutory license. The Benchmark Agreements between RIAA and a range of webcasters were reached during and after the voluntary negotiation period mandated by Congress. They involved the *same buyers*, *sellers*, *rights*, *copyrighted works*, *time period* and *medium* as the marketplace negotiation that Congress charged the Copyright Arbitration Royalty CARP ("CARP") to replicate.

The failure to consider either category of agreements in establishing the benchmark directly contravened this Court's instruction that the Librarian not reject critical evidence without explanation. *See National Association of Broadcasters v. Librarian*, 146 F.3d 907, 923 (D.C. Cir. 1998) (*"NAB v. Librarian"*). By failing to consider this critical evidence, the Librarian arbitrarily relied on an unduly narrow benchmark that yielded an artificially low rate of .07 cents per performance. Owners' Brief at 19-20, 27. In contrast, the Librarian presented a well-reasoned explanation, grounded in record evidence, for his reliance on the Yahoo! Agreement as the benchmark.

A. The Librarian Correctly Relied Upon the Yahoo! Agreement.

The Librarian correctly focused on the Yahoo! Agreement in his benchmark analysis. The decisions of both the CARP and the Librarian reflect a careful assessment of the Yahoo! Agreement, thoroughly grounded in the record of the CARP proceeding. *See generally* In re: Rate Setting for Digital Performance in Sound Recordings and Ephemeral Recordings, Report of the Copyright Arbitration Royalty Panel, No. 2000-9 CARP DTRA 1&2 at 60-70, 74-78 (February 20, 2002) ("CARP Report") (J.A.____); Librarian's Decision at 45245, 45248-49, 45251-55 (J.A.____). Because the Broadcasters' objections – which were previously considered and rejected on the basis of record evidence – involve the way the CARP and the Librarian

weighed the evidence and made credibility determinations in establishing a benchmark based upon the Yahoo! Agreement, they should be rejected again. As this Court said in *NAB v. Librarian,* "it is emphatically not our role to independently weigh the evidence or determine the credibility of witnesses." 146 F.3d at 930. That is exactly what the Broadcasters ask this Court to do.

1. The Yahoo Agreement Is a Comparable Benchmark.

The Owners and Performers believe that all 26 Benchmark Agreements contain "rates and terms for comparable types of digital audio transmission services and comparable circumstances," 17 U.S.C. § 114(f)(2)(B), that the Librarian should have used to determine a "zone of reasonableness" from which to establish royalty rates. There is no question, however, that use of one of these agreements – the Yahoo! Agreement – as part of the benchmark analysis was appropriate. The CARP and the Librarian correctly found that the Yahoo! Agreement was a comparable, if not perfect, marketplace benchmark that could be used to establish a zone of reasonableness for rates in this case. CARP Report at 70 and 74 (J.A.____); Librarian's Decision at 45252 (J.A.____).

The Broadcasters argue against the use of the Yahoo! Agreement, because they claim that the "willing seller" in the agreement, the RIAA, was operating as some sort of improper "cartel" with undue marketplace power. Broadcasters' Brief at 21-25. The CARP and the Librarian considered and rejected these arguments, because the record showed that RIAA and Yahoo! "entered into negotiations in good faith and on equal footing." Librarian's Decision at 45245 (J.A.____); *see also* CARP Report at 69 ("this agreement [ ] represents the results of a level playing field negotiation") (J.A.____). Extensive evidence in the record supports this conclusion.

First, the evidence was overwhelming that RIAA and its member record companies were anything but "willing sellers," because true willing sellers do not exist under a statutory license regime. *See* Noncommercial Educational Broadcasting Compulsory License; Final Rule, 63 Fed. Reg. 49823, 49834 (September 18, 1998) (J.A.____). Both the CARP and the Librarian found that the existence of the statutory license put downward pressure on license rates in voluntary agreements because, unlike in a true marketplace, the sellers do not have the ability to withhold their sound recordings absent agreement. The "willing buyers" – users of copyrighted works – can continue to use those works without an agreement (and without payment), while awaiting a CARP decision. The CARP weighed the "voluminous record" and undertook "questioning and credibility assessments of more than 30 witnesses" prior to concluding that the compulsory nature of the statutory license "effectively counterbalanced" the market power of the RIAA Negotiating Committee. CARP Report at 46 (J.A.____). The Librarian pointed out that many webcasters chose not to enter into voluntary negotiations, and that "[s]uch actions on the part of the users clearly impeded serious negotiations in the marketplace and support the CARP's observation that the statutory license had a countervailing effect on the negotiation process and limited the ability of RIAA to exert undue marketplace power." Librarian's Decision at 45245 (J.A.____). The fact that not a single Broadcaster entered into a voluntary license agreement illustrates this effect. *See* Broadcasters' PFOF ¶ 33 (J.A.____); Marks W.D.T. at 4, Note 1 (J.A.____). The Broadcasters were free to continue streaming sound recordings without such an agreement.

Second, no improper "cartel" activity affected negotiations with Yahoo!. RIAA negotiated with Yahoo! and other prospective licensees on behalf of its member companies pursuant to explicit congressional authority. Section 114(e)(1) provides an antitrust exemption

permitting common agents to undertake negotiations in order to facilitate voluntary agreement on statutory license rates and terms. *See* 17 U.S.C. § 114(e)(1). RIAA was not alone in receiving and exercising this authority. The Digital Media Association ("DiMA") acted on behalf of its webcaster members pursuant to this grant of antitrust immunity. Evidence at the hearing showed that DiMA had discouraged its members from pursuing voluntary licensing, and encouraged them to wait for the results of the CARP proceeding. RIAA PFOF ¶ 193 (J.A.____); Tr. 10446-49 (Marks) (J.A.____). The Broadcasters also negotiated with RIAA as a group. Marks W.D.T. at 4, Note 1 (J.A.____). And the members of DiMA and the Broadcasters had substantial power in the marketplace. Webcasters such as MTV and AOL (Spinner), and Broadcasters Clear Channel and Infinity had marketplace power equal to RIAA, before accounting for the statutory licenses that hampered RIAA's ability to operate in the marketplace by allowing licensees to use copyrighted sound recordings without negotiations. RIAA PFOF §§ 160-64 (J.A.____).

Third, the Librarian found that in negotiations with Yahoo!, RIAA's "negotiating advantage disappeared" because Yahoo! "brought comparable resources, sophistication and market power to the negotiating table." Librarian's Decision at 45245 (J.A.____). The negotiation "reflect[ed] a truly arms-length bargaining process on a level playing field between two major players of comparable skill, size and economic power." CARP Report at 61 (J.A.____). Even the Broadcasters recognize Yahoo!'s economic power: "Yahoo [ ] is a huge, profitable, global mega-portal able to turn website visits into substantial advertising revenues." Broadcasters' Brief at 27-28.

2. **The Librarian Properly Rejected a Litigation Cost Adjustment.**

The Broadcasters argue that an adjustment for litigation cost savings should have been made to rates derived from the Yahoo! benchmark. Broadcasters' Brief at 31. The Librarian

carefully considered an adjustment for litigation cost savings and found it unnecessary because the royalty rates were set at the midpoint, rather than the high end, of the "zone of reasonableness" based on the Yahoo! Agreement. "[T]he recommended rate falls into the zone of reasonableness even taking . . . [litigation cost savings] into account." Librarian's Decision at 45255 (J.A.____). No further adjustment is required.

In addition, the CARP was unable to quantify litigation cost savings, CARP Report at 68-69 (J.A.____), and "it cannot make adjustments based on mere speculation." Librarian's Decision at 45255 (J.A.____); *see also* CARP Report at 84 (J.A.____); Rate Adjustment for the Satellite Carrier Compulsory License; Final Rule, 62 Fed. Reg. 55742, 55750 (October 28, 1997) (J.A.____). The Librarian agreed that "the record contains no information quantifying the added value" of Yahoo!'s alleged cost savings.[2] Librarian's Decision at 45255 (J.A.____) (citing CARP Report at 29 (J.A.____)).

The Broadcasters also argue that Yahoo! could not await the outcome of the CARP proceeding due to substantial litigation costs associated with the proceeding. Broadcasters' Brief at 24. But there is a complete absence of evidence that Yahoo! was compelled to participate in litigation over the royalty rates. In fact, like many other licensees including some large companies such as Microsoft, Tr. 10144 (Marks) (J.A.____), Yahoo! could use the statutory license without participating in the proceeding below, allowing others to conduct the litigation.

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[2] The Broadcasters cite testimony regarding the fees Yahoo! allegedly expected to save with a voluntary license. Broadcasters' Brief at 32. That number, however, was an unsubstantiated witness estimate, which was not tested through examination of documentary records. The CARP was well within its discretion not to credit this testimony absent corroborating evidence.

See Librarian's Decision at 45245 (J.A.____). Relatively few of the over 2,300 licensees that signed up for the statutory license chose to litigate. RIAA PFOF ¶¶ 11, 18, 26 & 27 (J.A.____).

3. The Librarian Properly Set the Same Rate for Webcasters and Broadcast Simulcasters.

The Broadcasters also complain mightily that as the "willing buyer" Yahoo! was not comparable to the broadcast simulcasters, Broadcasters' Brief at 25, and thus the Librarian was arbitrary in setting the same rate for webcasters and broadcast simulcasters. Broadcasters' Brief at 29. Yet again, the Broadcasters are asking this Court to re-weigh evidence that was weighed below. That is something this Court has refused to do. *NAB v. Librarian,* 146 F.3d at 930.

The Broadcasters focus on the allegedly different business models of broadcast simulcasters and Yahoo!, claiming that streaming is more ancillary to the broadcast simulcaster model. Broadcasters' Brief at 25. But the Librarian found that, while Yahoo! offered many other services, based on "an examination of the record. . . . Yahoo!'s business with respect to radio retransmissions seems to be very similar" to the Broadcasters' fundamental business of reaching local audiences. "[B]oth business models are fundamentally comparable in at least one all-important way: they simulcast AM/FM programs over the Internet to anyone who chooses to listen." Librarian's Decision at 45254 (J.A.____). There was "no record evidence to distinguish these services." In general, "the record did not contain any evidence to support a different rate for commercial broadcasters" and the CARP "cannot make adjustments based on mere speculation." *Id.* at 45255 (J.A.____).[3]

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[3] The Broadcasters argue that it was not their burden to quantify differences from a benchmark they consider invalid. Broadcasters' Brief at 29. However, as the Librarian points out, the Broadcasters failed to propose a marketplace benchmark of their own. Librarian's Brief at 72. The CARP invited the parties to propose adjustments to the other parties' benchmark proposals and to the extent the Broadcasters chose not to make such proposals they should not have the

(footnote continued on next page)

The Broadcasters failed to meet their evidentiary burden of demonstrating to the CARP that, as they claim again (Broadcasters' Brief at 26-27), broadcast simulcasters would be unwilling to pay the rates set by the Librarian (or even the lower rates agreed to by Yahoo!) in a free marketplace. The Broadcasters' statements that they would not pay these rates do not reflect actual marketplace conditions, because they could continue to webcast anyway under the statutory license. In any event, the record showed that Yahoo! had not tried to pass through the royalty fee for transmissions to broadcast simulcasters, "so no determination could be made" as to whether the broadcast simulcasters would have paid it. Librarian's Decision at 45255 (J.A.____). As the Librarian points out, the Broadcasters have entered into a voluntary agreement to pay a rate for 2003-04 that is essentially the same as the 0.07 rate set by the Librarian for 1998-2002. Digital Performance Rights in Sound Recordings and Ephemeral Recordings; Final Rule in Docket Nos. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA, 69 Fed. Reg. 5693 (February 6, 2004) (J.A.____).[4] *See* Librarian's Brief at 72 n. 15 (2003-04 rate is "quite close" to 1998-2002 rate).

The Broadcasters suggest that their exemption from paying royalties for the over-the-air broadcast of sound recordings should affect the rate determination. Broadcasters' Brief at 26 and 30. But this exemption is based on a statutory provision, not on the forces of a free marketplace. Sherman W.D.T. at 16 (J.A.____); Tr. 301-10 (Sherman) (J.A.____). As the Librarian points

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opportunity to benefit from that failure on appeal. *See* Order, Docket No. 2000-9 CARP DTRA 1&2, Aug. 13, 2001 (J.A.____).

[4] Unlike the extra-record materials in the Licensees' briefs (*see* Section IV below), this Court can take judicial notice of this official notice published in the Federal Register. *See* Fed. R. Evid. 201(b).

out, Librarian's Brief at 70, despite the statutory exemption for over-the-air broadcasts, the Copyright Office and the courts have determined that broadcast simulcasts are not exempt from Section 114. *See Bonneville Int'l Corp. v. Peters,* 347 F.3d 485 (3d Cir. 2003). Moreover, the CARP found, and the Librarian agreed, that the relevant hypothetical marketplace in which the rates would be set is characterized by willing buyers that are "services which may operate under the webcasting license (DMCA-compliant services)." CARP Report at 24 (J.A.____); Librarian's Decision at 45244-45 (J.A.____). Over-the-air broadcasting has no place in this marketplace analysis.

Finally, the Broadcasters try yet again to extrapolate the promotional effect of over-the-air radio to Internet streaming. Broadcasters' Brief at 30-31. They object to the Librarian's rejection of the alleged consideration of promotion as a basis to set lower rates for broadcast simulcasters. Broadcasters' Brief at 31. The record did not support the CARP's conclusion that RIAA and Yahoo! considered promotion in setting a lower rate in the Yahoo! Agreement for streaming broadcast simulcasts. Both RIAA and the Broadcasters denied that the parties to the agreement made this adjustment. Librarian's Decision at 45252 (J.A.____); *see also* Broadcasters' Petition to Set Aside Determination of the Copyright Arbitration Royalty Panel, March 6, 2002, at 39 (J.A.____). In addition, the CARP made contradictory findings. It found that the studies on promotion offered in the proceeding showed "nothing about the net promotional effect of webcasting" and that "the net impact of Internet webcasting on record sales is indeterminate," CARP Report at 33-34 (J.A.____), yet used that same promotional impact as a rate setting factor. Librarian's Decision at 45252 (J.A.____). Given the contradiction between the CARP's own findings regarding the record evidence on promotion and the CARP's reliance

on promotional value to differentiate between rates for Internet-only webcasters and broadcast simulcasters, the Librarian's decision to reject that conclusion was not arbitrary.

B. The Librarian Arbitrarily Failed to Consider the 115 Label Agreements and the 25 Non-Yahoo! Benchmark Agreements.

The Librarian should have included the 115 Label Agreements and all 26 Benchmark Agreements in his benchmark analysis. Instead, he arbitrarily excluded all those agreements except the Yahoo! Agreement, although they were comparable voluntary agreements of the exact type contemplated in the statutory standard. *See* 17 U.S.C. § 114(f)(2)(A) & (B); *see also* 17 U.S.C. § 112(e)(3) & (4).

The Librarian's contention in his brief that his treatment of these agreements was "based on a reasoned consideration of the evidence and thus not arbitrary," Librarian's Brief at 64, is contrary to his arbitrary dismissal of those agreements. The Librarian's Decision shows such minimal consideration of the agreements that it fails to meet this Court's admonition not to reject critical evidence without explanation. *NAB v. Librarian*, 146 F.3d at 923.

The Librarian's failure to consider these agreements had a tremendous impact on the zone of reasonableness and the resulting royalty rates established in the proceeding. Appropriate consideration of all the Benchmark Agreements, which generally had rates in the range of 0.4 cents per performance, together with the corroborating evidence from the actual free market, would have yielded a unitary rate that was at least at the level of the 0.14 cents per performance rate the CARP adopted for Internet-only webcasters. CARP Report at 77 (J.A.____). By ignoring the extensive, additional, relevant record evidence of voluntary agreements, the Librarian established the "zone of reasonableness" for all Services at far too low a level and selected a rate at far too low a midpoint, thus adopting the artificially low rate of .07 cents per

performance for transmission of copyrighted sound recordings. Librarian's Decision at 45255 (J.A._____).

1. The CARP and the Librarian Ignored the 115 Label Agreements.

The 115 Label Agreements – which covered various types of comparable streaming services on the Internet, including both nonsubscription and subscription webcasting, co-branded and promotional webcasting, music videos, audio clips, music lockers, digital jukeboxes, and concert streaming (RIAA PFOF ¶¶ 316-17, pp. 169A-B (Figures 5 & 6) & App. A (J.A.____)) – were the product of free market negotiations (*i.e.*, negotiations unconstrained by a statutory license) between individual record companies and individual licensees (including many webcasters). They demonstrated that the rates in the Benchmark Agreements represented the range of rates that willing buyers and willing sellers would have agreed to in the actual marketplace to be replicated by the CARP. The Librarian asserts that "RIAA never attempted to identify with specificity the usefulness of these Label Agreements." Librarian's Brief at 67. But as RIAA showed repeatedly, the 115 Label Agreements, which involve various compensable uses of sound recordings, corroborate evidence of a substantially higher zone of reasonableness from which the Librarian should have set royalty rates. *See* RIAA PFOF ¶¶ 316-17 (J.A.____); Owners' Brief at 23.

The Librarian's Brief asserts that he accepted the CARP analysis rejecting use of the 115 Label Agreements, citing footnote 20 of his Decision for support. Librarian's Brief at 66. But this short footnote contains no substantive analysis. Instead, it shows that the Librarian did not understand the nature of the 115 Label Agreements, but thought that (1) they involved *making* (creating) copyrighted works instead of *streaming* them; and (2) they were all agreements for *one* type of activity (making works) rather than agreements for a *range* of uses of copyrighted sound

recordings by a variety of services that demonstrate the scope of the marketplace. The 115 Label Agreements licensed a range of services to stream sound recordings over the Internet, which is strong corroborating evidence of the marketplace rates that similar licensees would pay to stream the same sound recordings. *See* Librarian's Decision at 45248, note 20 (J.A.____) (the unredacted text in the June 20 Restricted version of the Decision (page 25) demonstrates the misunderstanding (J.A.____)).

In rejecting this critical evidence "without explanation," the Librarian "acted in an arbitrary manner in ratifying the [CARP's] action." *NAB v. Librarian*, 146 F.3d at 923 (internal quotations omitted). The CARP's cursory, one-paragraph dismissal of the 115 Label Agreements provides no grounds for the Librarian's Decision because it also demonstrates a misunderstanding – it inexplicably compares the 115 Label Agreements to the Licensees' rejected musical works benchmark. CARP Report at 71 (J.A.____). See discussion in Owner's Brief at 22. The CARP's treatment of the 115 Label Agreements was inadequate, and the Librarian's acceptance of that treatment without understanding the agreements was arbitrary.

The CARP's contention that many of the 115 Label Agreements reflect rates "lower than what RIAA was proposing," CARP Report at 71 (J.A.____) (cited in the Librarian's Brief at 68), appears to be based on a fundamental misunderstanding of the agreements' scope. As RIAA demonstrated in the proceeding below, the rates in the 115 Label Agreements are generally at the same level or higher than the rates the Owners and Performers proposed below. RIAA PFOF ¶¶ 316-17, pp. 169A-B (Figures 5 & 6) & App. A (chart summarizing rates and terms in all agreements) (J.A.____). To the extent that a few of the rates in the 115 Label Agreements are lower, the Librarian, like the CARP, appears to miss the reasons for that distinction. Unlike the statutory license, the 115 Label Agreements with individual record companies do not cover the

entire universe of copyrighted sound recordings. They show what buyers in the marketplace were willing to pay for some or all of the copyrighted sound recordings of just one record company. RIAA PFOF App. A (J.A.____). Thus, the 115 Agreements corroborate the rates that the Owners and Performers proposed for a *blanket license* covering the streaming of *the entire universe* of copyrighted sound recordings.

The Librarian's mischaracterization and apparent misunderstanding of the 115 Label Agreements renders arbitrary his summary rejection of those agreements. His rate determinations should be remanded to incorporate the 115 Label Agreements into the benchmark analysis.

2. The Librarian Arbitrarily Rejected 25 of 26 Benchmark Agreements.

The Librarian also arbitrarily failed to adopt as benchmarks 25 of the 26 voluntary agreements that RIAA negotiated with webcasters. He ignored extensive record evidence demonstrating that the Benchmark Agreements were comparable because they involved the *same buyers*, the *same sellers*, the *same rights*, the *same copyrighted works*, the *same time period* and the *same medium* as those in the marketplace negotiation to be replicated by the CARP. RIAA PFOF App. A ("Description of the 26 RIAA Licensing Agreements") (J.A.____). The Librarian's Brief mistakenly asserts that he accepted the CARP's decision to give the 25 non-Yahoo! Benchmark Agreements "little weight." Librarian's Brief at 64-65. But that is not what happened. Instead, the Librarian rejected the CARP's decision to accord *some* weight to these 25 Benchmark Agreements and failed to give them *any* weight (except by using the atypical minimum fee from one of the agreements to establish the annual minimum fee for all licensees, as discussed in Section II below). This occurred in three ways, each of which harmed the Owners and Performers:

- The Librarian ignored the CARP's decision to use the 25 non-Yahoo! Benchmark Agreements to set the lower boundary of the zone of reasonableness for Internet-only webcasters at .083, and instead used a zone of reasonableness with a much lower boundary to set a unitary rate of .07 for all commercial Licensees. Librarian's Decision at 45255 (J.A.____);
- The Librarian ignored the CARP's detailed process for reaching an ephemeral rate of 9%, which was based in part on considering the ephemeral rates in additional Benchmark Agreements to establish a "zone of reasonableness." Instead, the Librarian reduced the ephemeral rate to 8.8%, a reduction of more than two percent, based on the Yahoo! Agreement alone. Librarian's Decision at 45262 (J.A.____); and
- The Librarian arbitrarily rounded downward the midpoint of the lower "zone of reasonableness" that it established for the transmission of copyrighted sound recordings (while at the same time rejecting the CARP's decision to round the ephemeral rate upward). Librarian's Decision at 45255 (J.A.____). The rounding from .074 to .07 cost the Owners and Performers a reduction in the royalty rate of more than five percent.

The Librarian's refusal to rely on all 26 Benchmark Agreements to establish the rate benchmark is contrary to explicit statutory language permitting consideration of precisely these types of voluntary agreements. 17 U.S.C. §§ 112(e)(4) & 114(f)(2)(A). The Librarian's approach effectively writes these provisions out of the statute by making almost no agreement comparable enough to be included in the benchmark analysis.

It is also contrary to the Librarian's past treatment of benchmarks from comparable marketplace transactions, which if found to be less than "perfect" have been adjusted, not rejected. *See* PES Decision at 25396, 25399 (J.A.____); *National Cable Television Ass'n, Inc. v.*

Copyright Royalty Tribunal, 724 F.2d 176, 184 (D.C. Cir. 1983); *see also Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal*, 676 F.2d 1144, 1157 (7th Cir. 1982) ("[t]he Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences"). While the CARP at least gave the 25 non-Yahoo! Benchmark Agreements minimal weight (although Owners and Performers believe that weight should have been greater), the Librarian rejected this approach and, contrary to this Court's past instruction, arbitrarily failed to consider these agreements at all.

II. THE LIBRARIAN'S DECISION TO ADOPT A $500 MINIMUM FEE WAS UNREASONABLE AND CONTRARY TO THE RECORD EVIDENCE.

The Librarian's response to the Owners and Performers' objection to the arbitrary imposition of a $500 minimum fee for any type of eligible nonsubscription service appears to be predicated largely upon the failure of the Owners and Performers to invoke the "magic words" and argue that the fee was outside the "zone of reasonableness." Librarian's Brief at 73 and 75. This argument misses the point. The Owners and Performers demonstrated that applying the $500 minimum fee to the universe of eligible nonsubscription services was arbitrary because in the marketplace that fee was paid by one outlier – a small webcaster that used few copyrighted sound recordings in its streams – and thus was outside the zone of reasonableness. That one small webcaster had unique circumstances justifying a minimum fee well below the most common fee found in the Benchmark Agreements. *See* Tr. 9332-33, 9479 (Marks) (J.A.____); RIAA PFOF at ¶¶ 230-234 (J.A.____) and App. A at 16-22 (listing minimum fees) (J.A.____). The most typical minimum fee was $5,000. *Id.* (J.A.____).

The Librarian's brief incorrectly states that the central disputed issue regarding the minimum fee is its purpose, which he says that he and the CARP found to be solely to cover

administrative costs associated with the statutory license. Librarian's Brief at 74. But both the CARP and the Librarian stated that an additional purpose of the minimum fee was to compensate copyright owners for access to the range of works covered by the statutory license. Librarian's Decision at 45266 (J.A.____); CARP Report at 95 (J.A.____); *see also* Tr. 9389-90, 13793-94 (Marks) (J.A.____) (one purpose of the minimum fee is to provide compensation to owners of sound recordings).

The Librarian's argument that RIAA would not negotiate a minimum fee that would expose it to a loss, Librarian's Brief at 74 (quoting Librarian's Decision at 45263 (J.A.____)), ignores the obvious – a minimum fee that avoids incurring a loss to administer the statutory license for one small webcaster might well lead to a loss administering the license for webcasters and broadcast simulcasters in general. It assumes that RIAA would agree to the same minimum fee for all statutory licensees, including large, high-volume entities such as Yahoo! and Clear Channel. It was arbitrary and unreasonable to apply a low, outlying minimum fee to all webcasters and broadcast simulcasters in the face of marketplace evidence to the contrary.

This artificially low minimum fee thwarted a fundamental goal of Section 114, the negotiation of voluntary agreements for statutory license rates. 17 U.S.C. 114(f)(2)(A); *see* RIAA PFOF ¶ 50 (J.A.____). As the Librarian has noted, such voluntary agreements would be expected to produce a range of royalty rates. Librarian's Decision at 45244 (J.A.____). Instead, by picking the lowest outlier as the minimum fee for all Licensees, the Librarian has removed any incentive for the Owners and Performers to lower the minimum fee in response to the circumstances of a particular licensee.

Based on the overwhelming evidence of a range of higher minimum fees in the marketplace, this Court should enter an order setting an annual minimum fee of $5,000 or more.

III. THE LIBRARIAN ARBITRARILY CLAIMS UNLIMITED DISCRETION TO DEPART FROM THE EFFECTIVE DATE MANDATED BY CONGRESS.

When the Librarian's Decision was finally adopted in 2002, many Licensees owed royalty payments in arrears back to 1998. Librarian's Decision at 45240-41 (J.A.____). The Owners and Performers had waited years for these royalties, in effect providing the Licensees with an interest-free loan. Yet the Librarian exercised his supposed "discretion" to adopt a term delaying the effective date for royalty payment obligations for an additional two months. But Congress specifically provided for the payment of royalty payments in arrears soon after royalty rates are set, 17 U.S.C. § 114(f)(4)(C), and the Librarian had no discretion to delay that payment obligation.

The argument that the Librarian has unlimited discretion to set effective dates is particularly troubling because it suggests that there is no limit to the length of time the Librarian can postpone a statutory effective date, even if that results in payment delays of six months, a year, or ten years. The authority cited by the Librarian in support of this discretion, *see, e.g., Recording Industry Ass'n of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 14 (D.C. Cir. 1981) and similar cases, provides no guidance here, because unlike the situation discussed in those cases, Congress has specified the date on which payments in arrears must be made.

The Librarian misreads the Copyright Act to argue that he has discretion to set a term delaying the effective date. Statutory license royalty payment obligations flow from the date when rates are "set." *See* 17 U.S.C. § 114(f)(4)(B)(ii). The Copyright Act states that royalty rates are *set* when they are published in the Federal Register, and thus certain payment obligations are calculated starting from that date. *See id.* at §§ 114(f), 802(f). Despite contrary language in the Copyright Act, the Librarian asserts that royalty rates are not *set* when they are published in the Federal Register, but only on whatever date he declares them *effective*. But the

Librarian lacks such discretionary authority, especially where Section 114(f)(4)(C) of the Copyright Act provides that royalty payments in arrears will begin on the date specified in the statute.[5]

Section 802(f) demonstrates the flaw in the Librarian's theory that rates are not "set" when they are published in the Federal Register, but instead on whatever date the Librarian determines that they become effective (Librarian's Brief at 83). It provides that the Librarian, when rejecting the determination of a CARP, is required to issue an order "*setting* the royalty fee or distribution of fees as the case may be." 17 U.S.C. § 802(f) (emphasis added). Thus, the rates are set when the Librarian's final order is issued and published in the Federal Register. The Librarian appears simply to have ignored Section 802(f).

Section 114(f)(4)(C) further supports the conclusion that adopting a delayed effective date term was arbitrary. It reflects explicit Congressional intent to have royalty payments in arrears paid promptly after the royalty rates are set, specifying that the payments in arrears are due on the twentieth day of the month following the setting of the rates. 17 U.S.C. §114(f)(4)(C). Even if there were an argument that the Librarian could establish a later effective date absent Section 114(f)(4)(C), such an argument would fail here.

The Librarian's reasoning in support of delaying the effective date fails to support his decision. Neither the impact of the rate on licensees nor the alleged administrative burden on the

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[5] The Librarian tries to argue that the effective date term he established is not really a term. Librarian's Brief at 86. This strained argument is belied by the Librarian's Decision, in which the effective date is not only discussed in the section of the decision entitled "Terms" but is also listed as one of many terms that were "not disputed by the parties." Librarian's Decision at 45271 (effective date is undisputed term (i)) (J.A.____).

Office of promulgating regulations justified setting a term delaying the effective date. *See* Librarian's Brief at 86-88 (J.A.____).

Licensees have been on notice since the DMCA webcasting provisions became effective in 1998 that, if they chose to operate under the statutory license, they would owe royalty payments when the rates were finally set. *See* 17 U.S.C. §114(f)(4)(B)(i); Notice and Recordkeeping for Nonsubscription Digital Transmissions; Interim Rule Amendment, 64 Fed. Reg. 50758 (September 20, 1999) (J.A.____). Given the extended payment delays that the Owners and Performers had suffered already, any delay beyond that required by statute was arbitrary.

The Librarian also asserts that the Copyright Office needed more time to issue regulations and arrange administrative details related to the statutory license, Librarian's Brief at 87, but provides no support for this claim. In fact, the regulations implementing the terms related to royalty payments were attached to the Librarian's Decision, and no further action by the Librarian was required for them to become effective. Librarian's Decision at 45272-76 (J.A.____). The Copyright Office does not need time to set up its own systems to collect royalty payments, because the Office is not involved in the process. The only other regulations needed to implement the statutory license are those governing notice and recordkeeping, and as of the date of this filing the Copyright Office has failed to issue these regulations. *See* Owners' Brief at note 19. The continuing absence of these regulations more than a year after the delayed effective date set by the Librarian demonstrates that the regulations were not needed before payments were due.

IV. THIS COURT SHOULD REFUSE TO CONSIDER EXTRA-RECORD MATERIAL RELIED ON BY THE LICENSEES.

The Owners and Performers join the Librarian (Librarian's Brief at 43-44) in renewing their Joint Motion to this Court to strike from the Licensees' briefs materials that are outside the record of the proceeding below.[6] Consideration of this extra-record material is expressly precluded by Section 802(g) of the Copyright Act, which provides that this "court shall have jurisdiction to modify or vacate a decision of the Librarian only if it finds, *on the basis of the record before the Librarian*, that the Librarian acted in an arbitrary manner." 17 U.S.C. § 802(g) (emphasis added).

The record before the Librarian consists of "the record created in the arbitration proceeding." *Id.* at § 802(f). The Copyright Act mandates that the CARP "act on the basis of a fully documented written record." *Id.* at § 802(c). The emphasis on the creation and consideration of a formal record at every stage of the proceeding obviously would be undermined if parties were permitted to appeal the record-based decision on the basis of untested, extra-record evidence.

Limiting the record before this Court to material that was before the agency whose decision is subject to review reflects a fundamental principle of administrative law, designed to promote fairness. This Court has said that "the courts base their review of an agency's actions on the materials that were before the agency at the time its decision was made." *IMS, P.C. v.*

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[6] By this Court's Order of September 30, 2003, consideration of the Motion to Strike Briefs of Certain Petitioners Relying on Materials and Factual Allegations Outside the Record of the Proceeding ("Joint Motion"), filed on July 18, 2003 (J.A.____), was deferred pending oral argument. Given the word limitations on this reply brief and the many other issues to be addressed, this important issue can only be addressed briefly. More extensive discussion is found in the Joint Motion and the supporting Reply in Support of Motion to Strike ("Reply") filed by the Joint Movants on August 14, 2003 (J.A.____).

Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997); *see also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.") (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, (1971)).[7]

The Licensees violate this principle of fairness by relying on extra-record, unverified assertions that clearly fall outside the record and thus outside this Court's jurisdiction under Section 802(g). The record of the proceeding before the CARP closed once all evidence had been submitted by the parties. Once the CARP issued its report on February 20, 2002, that record was the basis for the Librarian's review and for petitions to this Court. Yet many of the extra-record references are to material dated after February 20, 2002.

For instance, the Broadcasters' Brief contains at least two references to material about the Yahoo! Agreement from outside the record. The references include unreliable and untested allegations about Yahoo!'s motivations for entering into a voluntary agreement with RIAA from an individual who never testified during the CARP proceeding,[8] and whose statements – which

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[7] The extra-record material in the briefs of the Licensees does not fall within the recognized categories of information to which this Court may accord judicial notice. The fact that statements of opinion and assertions are published does not make them subject to the judicial notice doctrine, which permits notice to be taken of facts only when they are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The accuracy of the extra-record statements and materials in the briefs of the Licensees would be strongly disputed by the Owners and Performers.

[8] The same post-record e-mail correspondence from this individual about the Yahoo! deal is quoted on pages 5-6 of the Beethoven.com Brief to support various factual allegations, including the erroneous assertion that the deal was built around multicasting to 250 listeners using a single stream of programming – an allegation that examination of the Yahoo! Agreement from the evidentiary record of the proceeding would demonstrate is false. *See* RIAA Exhibit No. 075 DR (RIAA/Yahoo! Agreement) (containing no provisions for multicasting) (J.A.____). This is one

(footnote continued on next page)

relate to events after he left the company – would have been vigorously contested by the Owners and Performers if he had made them during the CARP proceedings.[9] Broadcasters' Brief at notes 11 and 12, and Add. B.

The Broadcasters also refer to Yahoo!'s subsequent choice not to renew its voluntary agreement. Broadcasters' Brief at 11. As the arbitrators admonished the parties at the time this fact was raised by counsel for the Licensees in post-briefing oral argument, that fact is not in the record of the proceeding. Tr. 14719 (J.A.____). More fundamentally, as their counsel made clear at the oral argument, the Owners and Performers were prejudiced by not being able to offer this information into evidence to demonstrate the downward pressure of the statutory license on royalty rates. Tr. 14718-19 (J.A.____). At this point, the Owners and Performers have no ability to develop this evidence on the record, and they are prejudiced by the Broadcasters once again attempting to use extra-record material without allowing Owners and Performers the ability to place it in the proper context through cross-examination and rebuttal.

The Beethoven.com Brief relies on extensive, additional extra-record material, with multiple references to materials that were created after the record closed in February 2002, including, but not limited to, articles dated July 1, 2002 and July 12, 2002, congressional hearing testimony from 2003, a letter from Members of Congress from April 2002, a statement to

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(footnote continued from previous page)
of many examples where the Owners and Performers are hampered in their ability to refute the allegations by being tied to the record of the proceeding – a limitation that should apply equally to the Licensees.

[9] Broadcast.com was sold to Yahoo! in 1999, and the final deal between RIAA and Yahoo! for a voluntary license for the service that was formerly Broadcast.com was not reached until late 2000. In fact, no aspect of the agreement was finalized when Yahoo! took over negotiations. *See* Tr. 11242 (Mandelbrot) (J.A.____).

Congress from June 2002, and multiple website addresses to Internet web pages that likely changed over time. Beethoven.com Brief at 5-7, 12.

The reliance on extra-record material is not only impossible to reconcile with the scope of this Court's review authorized by Section 802(g), it is also unfairly prejudicial to the Owners and Performers. Because the material was not part of the record below, there was no opportunity to present opposing evidence or to test it through cross-examination. The Owners and Performers are now placed in the unenviable position of adhering to this Court's rules and limiting their briefs to the contents of the record, thus allowing the extra-record material to go partially or completely unrefuted. Even if they attempted to refute the material, they would not have a fair chance to do so without the opportunity to confront and cross-examine the sources of the extra-record materials, and possibly to present their own witnesses on subjects that have not been covered thus far in the record – an opportunity that cannot be provided in the context of this appeal.

In addition, allowing the Licensees to present this Court with materials beyond the record below leaves the Court with the difficult task of acting as a trier of fact and weighing evidence that was not considered below in order to evaluate the Librarian's Decision based on material that was before neither the CARP nor the Librarian. The Owners and Performers therefore renew their motion to strike any and all extra-record material and references from the briefs of Licensees and ask this Court to limit its review to the "record before the Librarian" as specified by Section 802(g).

CONCLUSION

The Owners and Performers renew their request to this Court to (1) vacate the Librarian's Decision establishing royalty rates for eligible nonsubscription services, and remand that rate determination with instructions to consider all the evidence in the record, including the Benchmark Agreements and the 115 Label Agreements, in addition to the Yahoo! Agreement; (2) vacate the Librarian's $500 annual minimum fee determination for eligible nonsubscription services and enter its own determination setting an annual minimum fee of $5,000; and (3) issue a determination that the Librarian does not have the authority to delay royalty payments in arrears beyond the date specified by Section 114 (f)(4)(C). In addition, the Owners and Performers ask this Court to (4) strike all extra-record material from the briefs of Licensees.

Respectfully submitted,

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February 12, 2004

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7), D.C. Circuit Rule 32(a) and this Court's briefing order of April 4, 2003, I hereby certify that excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2), this brief contains 7422 words, as calculated by my word processing system. This brief has been prepared in a proportionally spaced typeface using 12-point Times New Roman font, in compliance with the typeface and type style requirements of Fed. R. App. P. 32(a)(6) and D.C. Circuit Rule 32(a)(1).

Michele J. Woods

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CERTIFICATE OF SERVICE

I, Daniel Lee, hereby certify that I have served two copies of the foregoing Brief for Petitioners, this 12th day of February, 2004, by first class mail, to the following counsel of record:

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* Due to problems with U.S. mail delivery to government offices, the brief has been served by email and hand-delivery.